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BLUEPRINTS FOR SOUND PUBLIC POLICY

PASSPORTS, NOT STATE DOCUMENTS, ARE OPTIMAL EVIDENCE FOR DEERS GENDER MARKER CHANGES, EVEN FOR GUARD MEMBERS

October 19, 2015

Context: During the 2015-2016 repeal process, Pentagon officials sought advice about how to formulate inclusive policy for transgender service members. One point of concern was how to document gender marker changes, and some Defense Department officials advocated for the use of state documents such as drivers licenses. Palm Center scholars believed that reliance on state documents alone could undermine inclusive policy, and we provided this memo to senior officials in charge of the repeal process. The final policy included passports as an option to document gender change, in addition to state birth certificates and court judgments.

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Scholarly research by retired General Officers and leading experts has recommended that DoD rely on federal passport standards when changing gender markers in DEERS for transgender personnel.¹ The military already relies on passports as the gold standard for confirming DEERS identification information, and so new procedures are unnecessary. In addition, reliance on a standard federal practice avoids the inconsistency of state-level practices for changing gender markers, many of which make updates difficult or impossible, especially for personnel who have been assigned away from their home states.

An objection has been raised, however, that DoD cannot rely on passport standards when changing DEERS gender markers because the National Guard, a dual federal/state entity, cannot recognize DoD administrative procedures that are inconsistent with state law, at least when National Guard personnel are serving in state or hybrid (state/federal) status. In other words, a passport-based DoD practice would not work because the National Guard when operating as a state entity only recognizes state-issued documents such as birth certificates, and therefore Guard members would be recognized as one gender for state purposes and as the other gender for federal purposes.

This objection, however, is unfounded. Passports, not state documents, are optimal evidence for DEERS gender marker changes, even for Guard members. An argument that the National Guard is not bound by DoD regulation in maintaining or respecting DEERS information is legally unsupported and damaging to good order and discipline. When DoD and Guard policy conflict, DoD policy trumps.² And, DoD regulations for DEERS enrollment and identification documents explicitly apply to the National Guard without exception.³ Any other result would undermine consistent treatment of all persons serving in uniform, and states are not permitted to stand between the military and its members and obstruct military readiness.

DEERS serves as “the centralized personnel data repository that supports and maintains this policy in a uniform fashion.” It is the source of information for generating military ID cards and is designed to “provide and maintain medical and personnel readiness information on Uniformed Services members.”⁴

The key is that there is only one DEERS system and only one DEERS record for individual service members, including members of the National Guard, regardless of whether their status is state active duty, Article 32 federal/state hybrid duty, or federal active duty.⁵ A National Guard member’s status of duty among those categories can change, but a change in that status does not require the member to start all over again and

re-confirm their personal identifying data such as name, social security number, date of birth, or gender according to procedures an individual state might prefer.⁶

A similar “states’ rights” argument against DoD DEERS procedure failed. In 2013, several states and their National Guard units attempted to obstruct a DoD directive to recognize the legal marriages of gay service members, but then-Secretary of Defense Chuck Hagel directed the Guard to manage DEERS updates on an equal basis for all members, regardless of state civilian law. In an October 31, 2013 speech to the Anti-Defamation League, Secretary Hagel emphasized that DoD policy applies to all military components, including the Guard, and that equal treatment is a matter of readiness:

But several states today are refusing to issue these IDs to same-sex spouses at National Guard facilities. Not only does this violate the states’ obligations under federal law, but their actions have created hardship and inequality by forcing couples to travel long distances to federal military bases to obtain the ID cards they’re entitled to. This is wrong. It causes division among our ranks, and it furthers prejudice, which DoD has fought to extinguish, as has the ADL.

Today, I directed the Chief of the National Guard Bureau, General Frank Grass, to take immediate action to remedy this situation. At my direction, he will meet with the Adjutants General from the states where these ID cards are being declined and denied. The Adjutants General will be expected to comply with both lawful direction and DoD policy, in line with the practices of 45 other states and jurisdictions.

Whether they are responding to natural disasters here at home, in their states, or fighting in Afghanistan, out National Guardsmen all wear the uniform of the United States of America.⁷

¹ MG Gale S. Pollock, Shannon Minter et. al., *Report of the Planning Commission on Transgender Military Service* (Palm Center: August, 2014), 11-12.

² Under Title 32 of the United States Code, § 110, Congress delegated authority to the President to “prescribe regulations, and issue orders, necessary to organize, discipline, and govern the National Guard,” and DoD issues personnel policy for the Guard pursuant to this authority. Although the Guard operates under state command when not in federal status, it does so according to federal regulations and orders that apply to all Guard units. *Association of Civilian Technicians, Inc. v. United States*, 603 F.3d 989, 992-95 (D.C. Cir. 2010). To take one example, Army Regulation 135-178, *Army National Guard and Army Reserve Enlisted Administrative Separations*, establishes separation policy for the Guard, and it derives its authority from the Army and in turn DoD, not the states.

³ DoD Instruction 1341.2, *Defense Enrollment Eligibility Reporting System (DEERS) Procedures* (March 19, 1999), ¶ 2 (applying to all members of the Uniformed Services, including the National Guard); DoD Manual 1000.13 (Volume 1), *DoD Identification (ID) Cards: ID Card Life-Cycle* (January 23, 2014), ¶¶ 2, 4, and Appendix 1 to Enclosure 2, ¶ 2 (applying to all uniformed service members, including the National Guard as part of the Selected Reserve of the Ready Reserve; the Common Access Card “is the primary ID card for uniformed services members and shall be used to identify the member’s eligibility for benefits and privileges”).

⁴ DoD Instruction 1341.02, ¶¶ 4 and 4.1.2, 4.1.6.

⁵ For descriptions of the various state, federal, or hybrid state/federal statuses in which members of the National Guard can serve, see Lawrence Kapp & Barbara Salazar Torreon, *Reserve Component Personnel Issues: Questions and Answers* (Congressional Research Service: June 13, 2014), 21-22.

⁶ The Defense Manpower Data Center (DMDC) is the responsible agency for management of DEERS. It maintains a web site (milConnect) for confirming and managing personal information in DEERS that is a point of contact for all uniformed service members, including the National Guard. See <https://www.dmdc.osd.mil/milconnect/faces/index.jspx>. Interestingly, at the link for “Updating/Correcting DEERS Data,” it provides instructions for correcting name and gender in DEERS. Under current policy, however, this apparently refers to clerical errors in recording gender.

⁷ *Remarks by Secretary of Defense Chuck Hagel* (Anti-Defamation League: October 31, 2013). See <http://www.adl.org/press-center/c/remarks-by-secretary-of-defense-hagel.html> (accessed October 18, 2015).